In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1363

PETER NIVEN KIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not yet reported. The opinion of the district court is reported at 297 F. Supp. 339 (S.D.N.Y.) (Pet. App. 3-14).

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1970. Mr. Justice Harlan extended

the time for filing a petition for a writ of certiorari to March 27, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for burning his draft card was properly sustained under the principles enunciated in *United States* v. *O'Brien*, 391 U.S. 367.

2. Whether the trial court abused its discretion by refusing to accept petitioner's plea of *nolo contendere*.

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of knowingly destroying and mutilating his Selective Service Notice of Classification certificate (SSS Form 110) in violation of 50 U.S.C. App. 462(b)(3). On April 28, 1969, he was sentenced to imprisonment for a period of three months. The court of appeals affirmed *per curiam*.

The pertinent facts are not in dispute. Petitioner registered with his local Selective Service board (in Greencastle, Indiana) on November 7, 1956, and was classified I-A (App. 22a).[1] On July 13, 1961, petitioner returned his registration certificate and his notice of classification to the local board "as part of

[1] "App." refers to petitioner's appendix in the court of appeals, a copy of which is on file with the Clerk of this Court.

a protest against the preparations for war." Shortly thereafter, in a personal interview, petitioner was advised by the board that he should carry his registration and classification cards so as not to be considered in violation of the law. He was subsequently reclassified I-O and thereafter served a year in prison (June 1962 to June 1963) for refusal to report for alternative civilian service (*ibid.*).

On January 4, 1966, petitioner, then 27 years of age, sent his local board the following letter (App. 29a; Govt. Exh. 6):

> Please send me a new classification card (I-Y, I believe).[2] I do not know the whereabouts of the one which you sent to my home in Dunreith, Ind., in 1963; and I wish to burn one in sympathy with other people who have done so. The above address is my home address now.

Pursuant to this request, the local board prepared a duplicate notice of classification (including petitioner's I-O classification) which was mailed to him on January 13, 1966 (App. 25a).

Subsequently, petitioner burned his notice of classification at a pre-arranged press conference in New York City on March 24, 1966 (App. 25a-26a). At trial he admitted knowing that his action was unlawful (App. 81a) and stated that he destroyed his draft card on that occasion in order to "communicate to a wide audience through the press" (App. 72a).

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[2] In fact, petitioner had been reclassified I-O on August 12, 1964 (App. 24a).

ARGUMENT

1. Petitioner argues that his conduct in publicly burning his notice of classification constituted "symbolic speech" protected by the First Amendment. Recognizing, however, that *United States* v. *O'Brien*, 391 U.S. 367, held to the contrary, petitioner urges this Court to find critical factual distinctions between this case and *O'Brien* or, failing this, to reexamine and overrule *O'Brien*. Those contentions, we submit, are without substance and do not warrant plenary review by this Court.

a. Petitioner argues that his situation is different from the *O'Brien* case, since, unlike the registrant there, petitioner's chances of being drafted were remote at best. This argument fails to recognize, however, that the legitimate congressional purpose in protecting draft cards from destruction, sustained in *O'Brien*, is not necessarily related to the classification of a particular registrant. That purpose is to assure the efficient operation of the Selective Service System (see 391 U.S. at 378-380). Whether a registrant is subject to immediate call or where, as here, there may be little likelihood that the registrant will be required to serve, that purpose is furthered by the statutory prohibition. As the district court pointed out, petitioner (who burned his certificate at age 27) was liable for civilian service until reaching age 35 (see Pet. App. 10-11).

Nor can it fairly be urged (Pet. 29-37) that petitioner had no other method but draft-card burning to reach a significant audience regarding his views on

the Vietnam conflict. Recent history graphically attests to the fact that there are many affirmative, legitimate ways of expressing such dissent in a manner that reaches a vast segment of the population, but which does not constitute the plain violation of a penal statute.

b. It is further contended that the legal status of the statute prohibiting the destruction of draft cards was ambiguous at the time petitioner burned his and that, given this uncertainty, he was misled by the board's failure to warn him of the unlawful character of his intended act, despite the fact that he had made clear that he wanted the duplicate in order to destroy it as an act of protest. Petitioner was well aware, however, that the burning of his draft card violated federal law. Indeed, he depended upon that very illegality to attract the press coverage he sought. Moreover, unlike the *active* misleading by governmental agencies found in *Raley* v. *Ohio*, 360 U.S. 423, and *Cox* v. *Louisiana*, 379 U.S. 559 (on both of which cases petitioner relies), the local board in the instant case was completely silent on the matter. It obviously responded to his request as a matter of normal procedure under 32 C.F.R. 1623.7,[3] deeming that he had made a sufficient showing of loss in his letter. At all events, as the courts below held, the absence of a warning as to the legal conse-

[3] That provision (see Pet. 6) permits the issuance of a duplicate notice of classification at the written request of the registrant upon presentation of proof satisfactory to the local board that the original card has been lost or mislaid.

quences of destruction cannot be construed as approval of petitioner's contemplated act.[4]

c. Nor was the validity of the statute under which petitioner was prosecuted rendered uncertain because its constitutionality had not yet been decided by an appellate court at the time petitioner burned his card. Petitioner cannot escape criminal responsibility for a knowing violation of a congressional command by relying on the hope that the statute might be found unconstitutional sometime in the future.

d. Finally, in urging the Court to reexamine *O'Brien*, petitioner basically marshals the arguments considered and rejected in that case (see Pet. 18-26). There is no more occasion for the Court to overturn that reasoned decision now than there was for it to hold the statute invalid in that case. See *United States* v. *Dancis*, 406 F.2d 729 (C.A. 2), certiorari denied, 394 U.S. 1019.

2. Prior to trial, petitioner proffered a plea of *nolo contendere*. The trial judge withheld his consent to its acceptance, pursuant to Rule 11, F. R. Crim. P. Acceptance or not of such a plea is, under that rule, within the discretion of the judge; his decision in this regard should be upheld absent a showing of abuse. *E.g.*, *Mason* v. *United States*, 250 F.2d 704 (C.A. 10).

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[4] It borders on the frivolous, we submit, to urge that since petitioner had not made a sufficient showing of loss, the board violated the Selective Service regulations in sending him the duplicate and thereby denied him procedural due process.

Petitioner argues, however, that the trial judge was arbitrary in his refusal, in that even apart from certain differing legal consequences, there is a stigma attached to a determination of guilt not present in a *nolo* plea (Pet. 37-40). That a plea of *nolo contendere* might benefit the defendant is not, however, the sole determining factor. The trial court should properly consider, in addition, such factors as the public interest in the proceeding, the effect of the trial as a deterrent, and the nature of the alleged violation. See *United States* v. *Chin Doong Art*, 193 F. Supp. 820 (E.D.N.Y.); *United States* v. *Ultramarine & Color Co.*, 137 F. Supp. 167 (S.D.N.Y.). Here the trial judge announced at the start of the trial that he had given considerable thought to the matter and decided that the case was inappropriate for the acceptance of a *nolo contendere* plea (App. 21a). As the court of appeals held, there is no indication that, in view of all the circumstances, such refusal constituted an abuse of discretion (see Pet. App. 2).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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